UNITED STATES
v.
G & E LIVESTOCK COMPANY

IBLA 71-33 Decided September 1, 1972

Appeal from decision (Wyoming 4-69-2) by Hearing Examiner Robert W. Mesch dismissing an appeal from an allocation of an individual grazing allotment.

Affirmed

Grazing Permits and Licenses: Apportionment of Federal Range

An allocation by district manager of the federal range into individual allotments will be adopted where the permittee is given an equitable share of the forage available in the unit and of the potential forage production of the unit, and the permittee has not shown that an increase of forage available in the area allotted to it is the result of its past efforts.

Grazing Permits and Licenses: Apportionment of Federal Range

Where the evidence does not support the basis on which the district manager determined and allocated wildlife allowances within the individual allotments of a grazing unit, it is proper to remand the proceeding for a determination of these issues.

APPEARANCES: Milton A. Oman, for the appellant; Thomas C. Bogus, for the appellee.

OPINION BY MR. RITVO

G & E Livestock Company has appealed from a decision dated August 19, 1970, of a hearing examiner dismissing an appeal from a decision of a district manager as to the individual allotment given it in an adjudication of the Little Colorado unit of the Rock Spring grazing district, Wyoming.

The hearing examiner also remanded the proceedings for a redetermination of the amount of wildlife use in the unit and the apportionment of the allowable wildlife animal unit months (AUMs) within the allotments. Although the appellant did not appeal from this

portion of the decision, the Bureau of Land Management, in its answering brief or appeal, asserted that the district manager's determinations on the issue was proper.

After a review of the record, we agree with the decision below and adopt the hearing examiner's decision, a copy of which is attached.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Martin Ritvo
Member

We concur:

Douglas E. Henriques
Member

Frederick Fishman
Member

August 19, 1970

DECISION

G. & E. LIVESTOCK COMPANY,	:	WYOMING 4 ! 69 ! 2
	:	
Appellant	:	Appeal from District Manager's
	:	Decision dated October 3, 1968,
DAVID M. NELSON,	:	Rock Springs Grazing District.
	:	
Intervenor	:	

This appeal questions the actions of the District Manager, Rock Springs Grazing District, Bureau of Land Management, in the adjudication of the Little Colorado Unit and the establishment of allotments within the unit. The appellant contends that the decision of the District Manager is in error because the appellant did not receive (1) an equitable share of the available forage, (2) the benefit of increased grazing capacity resulting from the appellant's past efforts, (3) an equitable proportion of the potential for increases in grazing capacity, and (4) an equitable allowance for the grazing of wildlife (Appellant's Opening Brief, p. 22).

The District Manager's decision established the total Class I Federal range obligations in the Little Colorado Unit, the grazing capacity of the unit, and the base property qualifications of the appellant in the unit. The decision then stated:

> . . . it is necessary to limit the actual use to 69% of each operator's maximum base property qualifications to reach the current grazing capacity of the Federal range under present conditions and management practices. Present information indicates that the establishment of allotments and implementation of management plans will permit allowance of 85% of each operator's maximum base property qualifications to reach the grazing capacity of the Federal range. Beginning with the 1970 grazing season, your actual use will be limited to 85% of your maximum base property qualifications and confined to the allotment as described in paragraph 8 below, and will be in accordance with

> the management plan as it is developed. During 1973, the allotment(s) will be re-evaluated to determine if any further adjustment is warranted.

The decision allowed the appellant 2453 AUMs (85% of its recognized demand of 2886 AUMs), and confined the appellant's use to an area designated as the Boundary Allotment. The decision authorized the appellant, and presumably the other operators in the unit, a use in excess of the available forage to the extent of 16 percent of the base property qualifications.

The appellant did not present any evidence relating in any way to the findings of the District Manager with respect to the total obligations within the unit, the carrying capacity of the unit, or the qualifications of the appellant within the unit. 1/ The appellant did not attempt to show (other than in connection with the allowances made for the grazing of wildlife) that in the adjudication of the unit any operator received available forage in excess of 69 percent of the operator's base property qualifications (Cf. Tr. 78, 166). The undisputed evidence shows that the Boundary Allotment contains sufficient available forage to provide 1991 AUMs, or 69 percent of the appellant's Class I Federal range demand (Tr. 92, 98, 196). 2/

Insofar as this particular issue is concerned, the appellant has not shown that it received less than an equitable share of the available forage within the unit. 3/

The appellant contends that it should receive other areas of the Federal range in addition to that covered by the Boundary Allotment in order that it might retain the benefit of increased grazing capacity that has occurred

---

1/ The appellant did explore in a general manner the method of handling certain of its privileges that had been transferred from an adjoining district. The explanations offered by the district personnel were not, however, questioned.

2/ This issue is necessarily involved with the issue concerning the allowances for wildlife. If the figures used for wildlife allowances are in error, then there may not have been an equitable distribution of the available forage.

3/ The appellant did develop facts that would indicate that two of the allotments in the unit do not contain sufficient forage to satisfy 69 percent of the particular operator's qualified demand (Tr. 185, 224). This does not, however, establish that the appellant did not receive an equitable proportion of the available forage.

as a result of its past efforts. The appellant asserts that for many years in the past it has had the exclusive use of the area included within the Boundary Allotment, and another area of approximately 13 sections of land; that the forage within these two areas has greatly improved over the years under the careful management and protection of the appellant; and that the appellant should be the sole beneficiary of whatever improved condition has resulted from its own efforts.

With respect to the Boundary Allotment, the evidence shows that this area, together with the rest of the Little Colorado Unit, was a common use area (Tr. 58, 247); that the appellant was never awarded the exclusive use of this area (Tr. 45, 138); that for some undisclosed reason the appellant has, since at least 1963, had the exclusive use of this area (Tr. 126, 127); that prior to the construction of a fence along the district boundary in 1963, there was considerable use of the area by cattle from the neighboring district (Tr. 123, 124); and that there was considerable improvement in the forage following the construction of the fence and the elimination of the cattle from the area (Tr. 128). 4/ There is no evidence to support the conclusion that the grazing capacity of the Boundary Allotment was increased as a result of the appellant's careful management and use of the area.

The Little Colorado Unit was adjudicated and the allotments were established on the basis of a range survey conducted in 1963 (Tr. 60). Accordingly, the appellant has received the benefit of any increased grazing capacity within the Boundary Allotment that has occurred since 1963. On the basis of the record in this proceeding, this is a benefit that might be considered a windfall since it resulted from the fencing of the district boundary and not from the efforts of the appellant.

The evidence relating to the other area of approximately 13 sections of land shows that the appellant was accorded the temporary use of this area until such time as the Little Colorado Unit could be adjudicated (Tr. 22, 44); that the temporary use was for a part of the grazing season only!! from September 1 through October 31 (Tr. 47); and that for some unexplained reason the appellant has been the only operator using this area since at least 1963 (Tr. 126, 127). There is no evidence, however, that indicates that the grazing capacity of this area was increased as a result of the appellant's past efforts.

The appellant has not shown that it should receive additional areas of the Federal range in order that it might retain the benefit of any increased grazing capacity that has occurred in the past.

4/ The manager for the appellant's operation testified that after the cattle were sectioned off, the range improved, and it has been at its capacity for the past two or three years (Tr. 128).

As noted previously, the District Manager's decision concluded that "under present conditions and management practices" the forage within the Little Colorado Unit would only support 69 percent of each operator's maximum base property qualifications. The decision did, however, find that "present information indicates that the establishment of allotments and implementation of management plans will permit allowance of 85% of each operator's maximum base property qualifications". The decision also stated that "the potential forage production of the Little Colorado Unit is estimated to be 100% of the base property qualifications". The decision allowed the appellant, and presumably the other operators, to carry 15 percent of the base property qualifications as "suspended nonuse pending the development of increased range forage production in line with the estimated forage potential".

The appellant contends that the District Manager's decision did not accord it an equitable share of the potential forage production within the unit. The contention is not based on any evidence relating to the potential forage production of other allotments in the unit, but on the fact that the District Manager's decision erroneously estimated that the forage production of the appellant's allotment could be increased by 895 AUMs, or 31 percent of the appellant's base property qualifications. The appellant asserts that the Boundary Allotment has little, if any, potential forage production.

A range and wildlife specialist with the district office, who played a major roll in the adjudication and allotment of the unit, testified that in establishing the allotments they attempted to apportion the potential evenly so that all allotments could eventually provide sufficient forage to satisfy the Class I demand of each of the users (Tr. 170); that there are "roughly six to eight thousand acres of sagebrush ! grass vegetative types" within the appellant's allotment (or roughly one ! third of the area of the allotment) that would lend themselves to treatment for low sagebrush control (Tr. 177, 221); that you "could expect two to five times increase in present carrying capacity within these areas", and if "we spray 6,000 acres, it would be reasonable to predict that an increase of 700 AUMs could be obtained" (Tr. 177); and that it would be "reasonable to expect some increase in carrying capacity through management; possibly not as great, possibly as great [as that from spraying] . . . this could be accomplished through a rest rotation or deferred rotation system" (Tr. 178). 5/

The appellant presented a map obtained from the files of the district office showing "proposed range improvements" within the Little Colorado Unit (Ex. 1).

5/ While this witness had limited knowledge as to how the appellant operated in the past (Tr. 211, 242), there is evidence indicating that the appellant had not been operating under a rest and rotation system (Tr. 114).

The map was apparently prepared sometime prior to the fall of 1967 under the supervision of the then Area Manager for the Little Colorado Unit (Tr. 228, 229). The map shows a considerable number of large areas within the unit that were considered as being suitable for the spraying of big sagebrush (Tr. 62, 229). None of the areas lie within the appellant's allotment. 6/

A range management consultant employed by the appellant testified that the range in the Boundary Allotment "is of such good quality that it is unreasonable to expect an additional increase in carrying capacity" ! ! it is "between 95 and a hundred percent of potential right now" (Tr. 72, 109); that under "normal conditions you can expect a tremendous response in improved forage growth from spraying sagebrush", however, the areas in the allotment where big sagebrush could be sprayed are of such a size that it would not be economically feasible to spray (Tr. 74 ! 76); 7/ that from a management standpoint, the carrying capacity could be increased, but the degree would be very small because of the good condition of the range (Tr. 73); and that there are, however, management practices (presumably a rest and rotation system) that the appellant could initiate that would result in a substantial improvement in the forage condition, but he "wouldn't want to say at the present time it would be feasible" (Tr. 114).

Another range management consultant testified in behalf of the appellant and expressed essentially the same opinions as the first consultant.

The appellant has not in my opinion shown that the District Manager erred in estimating that the forage production in the Boundary Allotment could be increased by 895 AUMs over the production that existed at the time of the range survey in 1963. The appellant not only admits, but strenuously argues that the grazing capacity of the allotment has increased significantly since 1963. The record in this case does not reveal the potential that has been achieved since the fencing of the boundary between the two

---

6/ The record is somewhat confusing as to the type of sagebrush that might be sprayed. The range and wildlife specialist with the district office testified in terms of low sage (Tr. 218, 221), while Exhibit 1 and the testimony presented by the appellant deal principally with big sage.

7/ The witness testified that "you'd get so much more for your money by spraying brush [in the large areas shown on Exhibit 1] than you would by spraying little tiny patches in the proposed Boundary Allotment" (Tr. 102). The witness did not, however, know "how much cheaper" it would be to spray the large tracts rather than the small areas (Tr. 111).

districts in 1963, and prior to the time of the examination of the range by the appellant's consultants.

The appellant's evidence at best shows that additional potential can be achieved at the present time by spraying, but this might possibly be an unwise expenditure of Government funds because of the larger areas available for spraying outside the allotment; that additional potential can be achieved at the present time through management practices, but such practices might possibly be infeasible for the appellant; and that in view of such possibilities the range should at the present time be considered as producing 95 percent or more of its potential.

In the absence of any evidence as to the potential that has been achieved since the time of the range survey in 1963, and in view of the recognition by the appellant's consultants that additional potential can still be achieved at the present time, I cannot conclude that the decision of the District Manager did not accord the appellant an equitable share of the potential forage production within the Little Colorado Unit.

Insofar as the issue concerning potential is concerned, certain additional points should be noted. The appellant presented evidence and argument that the big sage in the Boundary Allotment is in the proportion that is desirable for wind and storm protection and consequently it should not be removed by spraying (Tr. 135, 150). The short answer to this contention is that the appellant can make an election as to whether it desires brush protection or an increase in grazing capacity.

The appellant argues that "judicial notice should be taken of considerations by the Executive Branch of the government to curtail any further use of chemicals in the control of vegetative cover because of the far reaching and uncontrollable damaging effects to the entire ecology". If this contention was accepted, it would work to the detriment and not the benefit of the appellant. The appellant's evidence shows that the larger and more suitable areas for brush spraying occur outside the appellant's allotment. If spraying is discounted, then the potential of the appellant's allotment would be decreased to a much smaller degree than the potential in the other areas in the Little Colorado Unit.

Even if the evidence established that the District Manager had erred in estimating the potential forage production within the Boundary Allotment, I would not remand the case with instructions to award the appellant additional acreage as requested by the appellant. 8/ If each operator within the

8/ The appellant continually speaks in terms of a designated number of additional acres that it should be awarded and the number of acres necessary to satisfy 1 AUM. This is meaningless inasmuch as the carrying capacity of the particular land is not shown by the record.

unit received an area containing sufficient available forage to satisfy 69 percent of the user's base property qualifications, it would certainly not be proper, simply because of the possible potential, to give the appellant additional areas, and thereby provide the appellant with a disproportionate share of the presently available forage. In other words, the appellant should not receive an area with a present grazing capacity of, for example, 90 percent of its base property qualifications in order that it might obtain sufficient potential to eventually satisfy 100 percent of its Class I privileges, if, as a consequence, other users receive areas with a present grazing capacity of, for example, 50 percent of their base property qualifications, but with a potential of possibly satisfying 100 percent of their Class I privileges. If the present and the potential grazing capacity cannot both be equitably distributed, then I believe that the proper course would be to award the range on the basis of the presently available forage production and at a later date consider adjustments based on the potential that has actually been achieved. 9/

The District Manager's decision provided for 1080 AUMs for wildlife in the Little Colorado Unit. The decision did not, however, specify how the wildlife AUMs would be apportioned among the various allotments in the unit. The appellant (presumably after comparing the carrying capacity of its allotment with its grazing privileges) contends that it should receive a larger allowance for the grazing of wildlife, and additional lands to provide sufficient AUMs for the wildlife in its allotment.

An employer of the district office testified that the "reservation for wildlife [antelope] was based upon the recommendations submitted by the [State] Game and Fish personnel . . . in 1962" (Tr. 167); that the apportionment of the 1080 wildlife AUMs within the allotments "was made on observations, district personnel, and based on discussions with the local Game and Fish people" (Tr. 167); that four allotments received allowances varying from 172 AUMs to 366 AUMs, for a total of 1072 AUMs (Tr. 181); that seven allotments received allowances ranging from 7 AUMs in the appellant's allotment to 151 AUMs in another allotment (Tr. 181); 10/ that

9/ Potential forage production is at best an extremely nebulous factor. It depends on a large variety of present and future circumstances that may or may not remain constant and that may or may not materialize.

10/ This gives a total of 1230 AUMs in six out of the eleven allotments that received allowances for wildlife. The record does not show the number of AUMs that were allowed for wildlife use in each of the other five allotments or the total number of AUMs allowed for wildlife in the eleven allotments. The witness was not able to explain the difference between the 1230 AUM figure for six of the allotments and the 1080 AUMs that were purportedly allowed for wildlife use in eleven of the allotments.

the AUMs in each allotment "over and above what was needed to satisfy the livestock proportionate share . . . were considered as being available for wildlife within the allotment" (Tr. 186); that on the basis of information "obtained from the Game and Fish Department, personnel", and not on the basis of his own knowledge, he considers that the antelope use within the appellant's allotment "relative to some of the other allotments within the unit is minor" (Tr. 191). 11/

The evidence relating to the wildlife allowances in the four allotments that received the major portion of the wildlife AUMs is also confusing. The witness from the district office testified that the Gasson Allotment received an allowance of 315 AUMs for wildlife (Tr. 181). This figure was arrived at by subtracting the operator's recognized demand (which the witness found to be 1056 AUMs) from the total carrying capacity of the allotment (which the witness found to be 1371 AUMs) (Tr. 184). The witness was unable to explain why his figures, which he compiled a week prior to the hearing from allotment summary sheets, were different from figures previously prepared by the district office showing the carrying capacity of this allotment as 1648 AUMs (Tr. 187!189). 12/ The allotment summary sheets, in their present form, support the figure found by this witness (Ex. C). However, one of the range management consultants employed by the appellant testified that he checked the basic records from which the allotment summary sheets were prepared and arrived at the same figures as originally found by the district office (Tr. 261, 262).

The witness from the district office testified that the Lombard Allotment received a wildlife allowance of 219 AUMs (Tr. 181). This is presumably based upon his recent calculations which show a carrying capacity for the allotment of 3579 AUMs (Ex. D). 13/ Two operators use this allotment (Ex. B)

11/ The witness admitted that "it's just hearsay information . . . as to where these antelope might be grazing," and that he has "no knowledge" as to whether there is or is not substantial antelope use within the appellant's allotment (Tr. 192).
12/ The other figures prepared by the district office show an excess of 592 AUMs in the Gasson Allotment rather than the 315 AUMs found by this witness (Exs. 2 and C).
13/ The figures previously prepared by the district office show a carrying capacity of 3233 AUMs (Exs. 2 and C).

with grazing privileges totaling 3178 AUMs. 14/ Based upon the 3579 AUM figure of the witness, this would leave excess forage in the allotment to the extent of 401 AUMs which presumably could be used for wildlife.

The Highway Allotment purportedly received an allowance of 366 AUMs for wildlife (Tr. 181). The carrying capacity of this allotment by both sets of figures prepared by the district office is 3891 AUMs (Exs. 2, C and D). Three operators use this allotment (Ex. B) with grazing privileges totaling 3434 AUMs. This leaves excess forage in the amount of 417 AUMs which presumably are available for use by wildlife.

The Big Sandy Allotment purportedly received a wildlife allowance of 172 AUMs (Tr. 181). The carrying capacity of this allotment by both sets of figures prepared by the district office is 3696 AUMs (Exs. 2, C and D). One operator uses this allotment (Ex. B) with grazing privileges of 3625 AUMs. This leaves excess forage in the amount of only 71 AUMS. One of the appellant's consultants testified that there are actually only 3512 AUMs available within the allotment (Tr. 263). This would leave the allotment 113 AUMs short of even satisfying the livestock demand. 15/

From the foregoing it should be abundantly clear that this proceeding must be remanded to the district office for a reconsideration of (1) the total number of AUMs that can be allowed for wildlife use in the Little Colorado Unit, and (2) the apportionment of the allowable wildlife AUMs within the various allotments.

I see no reason to consider the evidence offered by the appellant relating to its contention that it should receive more than 7 AUMs as an allowance for antelope use in its allotment. I should, however, note that if another hearing is held, I am going to give full consideration to the testimony of individuals with personal knowledge of the facts and little, if any, consideration to hearsay evidence that is not subject to cross ! examination.

14/ This figure is taken from a document entitled "Summary of Little Colorado Adjudication" which was attached to the decision issued by the District Manager.
15/ The record is not sufficient to attempt to assess any of the conflicting evidence or the presumptions that have been noted.

That portion of the record relating to competing use by wild horses within the appellant's allotment and whether there are, in fact, wild horses in the area, is in such a state that I am hesitant to reach any conclusions that would bind the parties at this time. I believe that this should also receive further consideration by the district office.

The appeal is dismissed as to the first three issues presented by the appellant. The case is remanded to the District Manager for reconsideration of the allowances for wildlife.

Robert W. Mesch
Hearing Examiner

Enclosures:
Statement of Appeal Procedures
Statement of Amendments to Regulations

Distribution:
By Certified Mail
Milton A. Oman, Attorney for Appellant
710 Continental Bank Building
Salt Lake City, Utah 84101
Thomas C. Bogus
Office of the Field Solicitor
P. 0. Box 983
Cheyenne, Wyoming 82001
David M. Nelson
Box 429, Kemmerer, Wyoming 83101

cc:
John B. Erramouspe, Manager and Secretary
G. & E. Livestock Company
108 Second Street
Rock Springs, Wyoming 82901

Hearings Division, Washington, D. C.
State Director, Wyoming
District Manager, Rock Springs, Wyoming
Standard Grazing List

x